U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAURA M. WINGFIELD and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Battle Creek, MI

Docket No. 98-500; Submitted on the Record;
Issued October 22, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

On March 31, 1995 a notice of traumatic injury and claim was filed on behalf of appellant, then a 39-year-old certified nursing assistant, alleging that she sustained injury on March 29, 1995 to her back. In a decision dated July 27, 1995, the Office accepted appellant's claim for right shoulder strain. On May 25, 1995 appellant filed a claim for recurrence of disability beginning March 30, 1995. She indicated that she returned to work on April 12, 1995 and stopped work on April 20, 1995 due to pain as it was hard to function. In a decision dated October 6, 1995, the Office denied appellant's claim for recurrence of disability beginning March 30, 1995 on the grounds that the evidence of file failed to demonstrate a causal relationship between the claimed disability from work and her accepted March 29, 1995 employment injury. On August 12, 1997 appellant filed a request for reconsideration that was postmarked August 14, 1997. In a decision dated August 22, 1997, the Office denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

The Board finds that the Office properly denied appellant's August 12, 1997 request for reconsideration on the grounds that her request for reconsideration was untimely and lacking clear evidence of error.[1]

[1] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on November 24, 1997, the only decision before the Board is the Office's August 22, 1997 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations[3] which provide guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review … a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[4] In *Leon D. Faidley, Jr.*,[5] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's procedure manual provides:

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written decision, any denial of modification following reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[6]

The Office properly determined that appellant's August 12, 1997 request for reconsideration which was postmarked August 14, 1997 was not timely as it issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on October 6, 1995. The August 12, 1997 request for reconsideration was received outside of the one-year time period for requesting reconsideration. Therefore, the Office properly found that appellant filed an untimely application for review.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[7]

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.138(b).

[4] 20 C.F.R. § 10.138(b)(2).

[5] 41 ECAB 104 (1989).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(a) (May 1991).

[7] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by the Office.[8] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[11] This entails a limited review by the Office of how the evidence submitted with the request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[12] To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a fundamental question as to the correctness of the Office decision.[13] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[14]

With her request for reconsideration, appellant submitted a Social Security Administration (SSA) decision dated June 9, 1997 in which the SSA accepted appellant's claim before it for disability, finding that she established that she sustained a depressive disorder and a pain disorder. Appellant also submitted medical reports which addressed her neck and shoulder complaints. In addition, subsequent to the issuance of the October 1995 decision appellant submitted medical reports addressing her neck and shoulder complaints, and objective studies, including, a magnetic resonance imaging (MRI) scan of the cervical spine and electromyography (EMG) and nerve conduction studies of appellant's right arm. Appellant also submitted a functional capacity evaluation dated April 10, 1996. In medical reports from October 26, 1995 to January 12, 1996, Dr. Phyllis Lashley-Alder, appellant's treating physician, indicated that appellant was examined in the pain clinic for a chronic myofascial pain in the upper back and neck. Dr. Alder's reports are of limited probative value as she did not provide any history of injury or relate appellant's diagnosed conditions to factors of her federal appointment.[15] Appellant also submitted a report dated September 26, 1997 by Dr. Kwan Soo Kim, a general practitioner, in which he noted complaints of neck pain and reported that appellant has sustained a "shock-type snap" in her right neck and shoulder while lifting a patient. Dr. Kim indicated he treated appellant with medications for several weeks and referred her to an orthopedic doctor for

[8] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[9] *Leona N. Travis*, 43 ECAB 227 (1991).

[10] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[11] *See Leona N. Travis, supra* note 9.

[12] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[13] *Leon D. Faidley, Jr., supra* note 5.

[14] *Gregory Griffin, supra* note 7.

[15] *James A. Wyrich,* 31 ECAB 1805 (1980).

additional treatment. This report is also not sufficient to establish clear evidence of error as Dr. Kim's report is not rationalized. He has provided an accurate history of injury but has not provided any discussion concerning whether the diagnosed condition was causally related to appellant's accepted injury. Appellant also submitted a functional capacity evaluation in which an occupational therapist and physical therapist indicated she did not complete the functional capacity evaluation and walked out of the clinic. The opinion of the physical therapist and occupational therapist who administered the functional capacity evaluation cannot be construed as competent medical evidence, in any case, as they are not physicians within the meaning of the Act, and, therefore, their opinion does not constitute probative evidence in this regard.[16] Lastly, appellant submitted a decision from the SSA which indicated that they accepted her claim with them for disability. Findings of other administrative agencies are not determinative with regard to proceedings under the Act which is administered by the Office and the Board.[17] Therefore, none of the evidence submitted with appellant's request for reconsideration established clear evidence of error in the Office's October 6, 1995 decision. The Office properly denied her request for reconsideration as untimely and lacking clear evidence of error.

The decision of the Office of Workers' Compensation Programs dated August 22, 1997 is hereby affirmed.

Dated, Washington, D.C.
October 22, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[16] *See Joseph N. Fassi*, 42 ECAB 677 (1991); *Betty G. Myrick*, 35 ECAB 922 (1984).

[17] *George A. Johnson*, 43 ECAB 712 (1992).